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Harry V. Meissner

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## LIABILITY OF AUTOMOBILE DRIVERS TO GRATUITOUS PASSENGERS UN- DER THE WISCONSIN LAW

HARRY V. MEISSNER

WITH the advent of the automobile, creating as it did a new peril in the use of highways,<sup>1</sup> courts were soon required to judicially determine the rights and liabilities of gratuitous passengers in such motor driven vehicles. The courts were influenced on the one hand by a desire to penalize careless driving,<sup>2</sup> and on the other by a realization that too severe a standard of care imposed upon the drivers of automobiles might result in a generous open-hearted person who invited a guest to take a ride in his car being found liable in damages to such guest in an amount greater than the cost of the car itself.<sup>3</sup> That

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<sup>1</sup> *Lauson v. Fond du Lac*, 141 Wis. 57, 123 N.W. 629 (1909).

<sup>2</sup> "Notwithstanding the automobile has won the judicial encomium of being a harmless instrumentality, the fact remains that its toll of life and limb far exceeds that of any other human agency. An automobile moving at an ordinary speed requires the constant attention of the driver if it is not to become a menace to the safety of its occupants as well as pedestrians. The locomotive engineer may contemplate the landscape with comparative assurance that his train will not run into the ditch, but the driver of a car may take but momentary glances at his surroundings if he would keep his car upon the highway and preserve the security of its occupants." *Sommerfeld v. Flury*, 198 Wis. 163, 223 N.W. 408 (1929).

<sup>3</sup> "There are many who cannot afford to own an automobile. There are few who do not covet the comfort, pleasure, and recreation afforded thereby. It is an act of kindness and consideration for the owner of a car to lend its comfort and pleasure through an invitation extended to his less fortunate neighbor

Wisconsin, as well as other commonwealths, has experienced some difficulty in establishing a standard of liability for automobile drivers that adequately meets the problem involved will probably be apparent from this summary of the rights and liabilities of gratuitous automobile passengers under the rules of law presently obtaining in the state of Wisconsin.

#### IMPUTED NEGLIGENCE THEORY

Under the early Wisconsin rule one who voluntarily became a passenger in a conveyance thereby so far identified himself with the driver that he could not recover for an injury negligently inflicted by a third person, if the driver's negligence was a contributing cause.<sup>4</sup> Thus in an early case, where the plaintiff was injured by the overturning of a livery carriage, the trial court instructed the jury, "\* \* \* So, if you find conclusively to your minds contributory negligence on the part of Ternes, the driver, then the plaintiff cannot recover." Discussing this charge, the then Chief Justice, Edward G. Ryan, said, "One voluntarily in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own, and assumes the risk of the skill and care of the person guiding it. Pro hac vice, the master of a private yacht or the driver of a private carriage is accepted as agent by every person voluntarily committing himself to it."<sup>5</sup> Upon the same occasion, commenting upon the relationship of guest and host, the court remarks, "A woman may and should refuse to ride with a man, if she dislikes or distrusts the man, or his horse, or his carriage. But, if she voluntarily accepts his invitation to ride, the man may, indeed, become liable to her for gross negligence; but as to third persons, the man is her agent to drive her—she takes man and horse and carriage for the jaunt, for better, for worse."

The theory underlying the imputed negligence doctrine was that when the plaintiff entered the driver's conveyance to ride with him, he made such conveyance for the time being his own, the negligence of the driver being imputed to such passenger.<sup>6</sup> This rule was reiterated

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for a ride in the country to join a picnic party, or to enjoy an evening at the theater in a nearby city. This is a species of hospitality which should be encouraged rather than discouraged, and the law should not couple with this friendly act a duty which makes its exercise an unreasonable hazard." *O'Shea v. Lavoy*, 175 Wis. 456, 185 N.W. 525 (1921).

<sup>4</sup> That negligence on the part of the driver would preclude recovery by a passenger seemed assumed as early as *Houfe v. Fulton*, 29 Wis. 296 (1871).

<sup>5</sup> *Prideaux v. City of Mineral Point*, 43 Wis. 513 (1878).

<sup>6</sup> *Rütger v. City of Milwaukee*, 99 Wis. 190, 74 N.W. 815 (1898).

by the Wisconsin Supreme Court upon many occasions.<sup>7</sup> Thus the court in one case says, “\* \* \* if he can see objects but ten feet ahead, while he cannot stop his car in less than twenty feet, is he using ordinary care? If not, and injury results from his negligent act, neither he nor his passengers, if the conveyance be a private one, can recover damages for such injury.”<sup>8</sup> The doctrine of imputed negligence was not applied to public conveyances.<sup>9</sup> As to private conveyances, however, such rule seemed permanently established in the law of Wisconsin, the court having said that, if any change were to be made, it was for the legislature to do so.<sup>10</sup>

#### IMPUTED NEGLIGENCE DOCTRINE OVERRULED

As late as *Puhr v. Chicago & N. W. R. Co.*<sup>11</sup> the Wisconsin Supreme court is found remarking, “It is well established in this state that the negligence of the driver of a private conveyance is imputed to the persons voluntarily riding with him.” This condition of well established permanence did not last much longer. For in *Reiter v. Grober*<sup>12</sup> the Wisconsin Supreme Court, “the more readily because no litigant before the court suffers by reason of the repudiation of the doctrine,” overruled the imputed negligence rule, terming such doctrine, “the doctrine now to be laid to rest after a vigorous life of fifty years.” In the case then under consideration, action was brought for injuries sustained by plaintiff in being run over by an automobile in which party defendant was a passenger. The theory of the plaintiff’s case, i.e., that the occupant was an agent of the driver and as such liable to third persons for the negligence of the driver was an ingenious but transparently unsound attempt to extend the imputed negligence theory to the extent of making occupants of automobiles insurers of third persons against the negligence of the driver.

The court not only declined to so extend the holding in *Prideaux v.*

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<sup>7</sup> *Otis v. Janesville*, 47 Wis. 422, 2 N.W. 783 (1879); *Johnson v. Superior R.T.R. Co.*, 91 Wis. 233, 64 N.W. 753 (1895); *Lockwood v. The Belle City Street R. Co.*, 92 Wis. 97, 65 N.W. 866 (1896); *Olson v. The Town of Luck*, 103 Wis. 33, 79 N.W. 29 (1899); *Hains v. Johnson*, 154 Wis. 648, 143 N.W. 653 (1913); *Sommerfield v. Chicago M. & St. P. R. Co.*, 155 Wis. 102, 143 N.W. 1032 (1913); *Kuchler v. Milwaukee E. R. Co.*, 157 Wis. 107, 146 N.W. 1133 (1914); *Puhr v. Chicago & N. W. R. Co.*, 171 Wis. 154, 176 N.W. 767 (1920).

<sup>8</sup> *Lauson v. Fond du Lac*, *supra*.

<sup>9</sup> *Landry v. Great Northern Ry. Co.*, 152 Wis. 379, 140 N.W. 75 (1913); *Ellis v. C. & N. W. R. Co.* 167 Wis. 392, 167 N.W. 1048 (1918); *Bakula v. Schwab*, 167 Wis. 546, 168 N.W. 378 (1918).

<sup>10</sup> *Lightfoot v. Winnebago Traction Co.*, 123 Wis. 479, 102 N.W. 30 (1905).

<sup>11</sup> 171 Wis. 154, 176 N.W. 767 (1920).

<sup>12</sup> 173 Wis. 493, 181 N.W. 739 (1921).

*City of Mineral Point*, but also expressly overruled such holding, insofar as it imputed the negligence of the driver of a private vehicle to an occupant therein. The court did not discuss "when and under what circumstances the occupant may be guilty of contributory negligence or engaged in a joint undertaking with the driver or stand in such relation to him that the negligence of the driver may be imputed to him." The practical effect of the decision was that henceforth it would be necessary to determine the question of the negligence of the occupant of an automobile as a separate and independent question.<sup>13</sup>

The above holding did not, however, abrogate the general rule that a passenger in an automobile is required to use the same care for his safety that a reasonably careful person would exercise under the same or similar circumstances.<sup>14</sup> Therefore, in addition to more precisely defining the duty devolving upon the driver of a motor vehicle,<sup>15</sup> the courts have defined and developed certain duties and responsibilities devolving upon guests in automobiles. For the most part such duties are not imposed upon passengers for hire in "jitneys," busses, or taxicabs.<sup>16</sup>

<sup>13</sup> *Mitchell v. Raymond*, 181 Wis. 591, 195 N.W. 855 (1923).

<sup>14</sup> *Howe v. Corey*, 172 Wis. 537, 179 N.W. 791 (1920); see also *Wuppler v. Schenck*, 178 Wis. 632, 190 N.W. 555 (1922).

<sup>15</sup> The driver of an automobile on a public highway owes to a gratuitous guest the duty of exercising ordinary care not to increase the danger to the guest which the latter assumes on entering the car, or to create a new danger. *Waters v. Markham*, 204 Wis. 332, 235 N.W. 797 (1931); *Poneitowicki v. Harres*, 200 Wis. 504, 228 N.W. 126 (1930); *Page v. Page*, 199 Wis. 641, 227 N.W. 233 (1929). However, as far as lookout and inattention are concerned, as distinguished from inexperience or lack of skill possessed by the driver, the host owes the same degree of care to his guest as he owes to others. *Heims v. Bluhm*, 200 Wis. 321, 228 N.W. 599 (1930). "There are certain duties imposed upon the drivers of automobiles, the abilities to perform which do not depend upon experience or acquired skill. Among these is the duty to maintain a reasonable speed, obey the law of the road, keep a proper lookout, etc. These are duties which are required to be observed for the safety of everyone—those within as well as those without the automobile—and failure to perform them may result in liability in the absence of acquiescence or contributory negligence on the part of the guest." *Poneitowicki v. Harres*, *supra*.

<sup>16</sup> When one hires a taxicab he contracts for safe transportation to his destination; he has every right to expect that the cab is manned by a skilled and competent driver; therefore, under ordinary circumstances, he is not required to warn the driver nor maintain a lookout. *Scales v. Boynton Cab Co.*, 198 Wis. 293, 223 N.W. 836 (1929). "The duty imposed on common carriers is to provide for the safety of passengers and to exercise the highest degree of care reasonably to be expected from human nature and foresight in view of the character of the conveyance adopted and consistent with the practical operation of the business." *McCaffery v. Automobile Liability Co., Limited Mutual*, 176 Wis. 230, 186 N.W. 585 (1922). The carrier must meet "the standard of per-

The following discussion is an attempt to summarize the duties and responsibilities devolving upon gratuitous automobile passengers under the Wisconsin Supreme Court decisions. An attempt will also be made to indicate the importance and trace the development of the "assumption of risk" doctrine, the rule that one assumes the consequences of acts to which he knowingly consented and which he voluntarily permitted.<sup>17</sup>

#### DUTY OF MAINTAINING A LOOKOUT

The decisions of the Wisconsin Supreme Court clearly indicate that the guest in an automobile must maintain some sort of lookout. What will be held to be a sufficient lookout varies with the facts and circumstances of each particular case. "It is well settled that a guest in an automobile must give some heed to his or her own safety, and that ordinary care requires that he or she should maintain a proper lookout \* \* \*. What constitutes a proper lookout depends upon circumstances. While the circumstances may be so clear that a failure to keep a proper lookout may be declared as a matter of law, it is generally a jury question \* \* \*. A guest is not held to the same degree of care in this respect that is required of the driver, and one sitting on the back seat is held to a less degree of care than one sitting on the front seat."<sup>18</sup>

Thus, while constant attention is not always required,<sup>19</sup> a total

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sons generally, in the same business under the same circumstances." *Ormond v. Wisconsin Power & Light Co.*, 194 Wis. 305, 216 N.W. 489 (1927). See also *Anderson v. Yellow Cab Co.*, 179 Wis. 307, 191 N.W. 748 (1923); *Carson v. Green Cab Co.*, 186 Wis. 566, 203 N.W. 394 (1925); *Dibbert v. Metropolitan Inv. Co.*, 158 Wis. 69, 147 N.W. 3 (1914); *Ferguson v. Truax*, 132 Wis. 478, 110 N.W. 395, 111 N.W. 657, 112 N.W. 513 (1907); *Oberndorfer v. Pabst*, 100 Wis. 505, 73 N.W. 338 (1898); *Merton v. Mich. Central R. Co.*, 150 Wis. 540, 137 N.W. 767 (1912).

<sup>17</sup> As to the distinction between assumption of risk and contributory negligence as defenses to actions brought by guests against hosts see Note 18 *Iowa Law Rev.* 358 (1933); in Wisconsin it has been said, "To the lay mind at least the term 'assumption of risk' is distinguished from that of 'contributory negligence' because contributory negligence involves fault and assumption of risk does not." *Biersach v. Wechselberg*, 206 Wis. 113, 238 N.W. 905 (1931). As to whether assumption of risk should come under the Comparative Negligence Law, sec. 331.045, Wis. Stats., see *Richard V. Campbell*, "Wisconsin's Comparative Negligence Law," 7 *Wis. Law Rev.* 223 at 235-241 (1932).

<sup>18</sup> *Krause v. Hall*, 195 Wis. 565, 217 N.W. 290 (1928). In this case the court refused to hold the passenger guilty of contributory negligence as a matter of law, although she failed to discover the presence of a train, because the reason her vision was obscured was that she was afflicted with asthma and held her coat collar over her face to protect her lungs.

<sup>19</sup> A wife sitting in the rear seat when her husband is driving a car over a road apparently in good condition is not bound to pay constant attention to

failure to observe the road and probable dangers would, if injury suffered was attributable thereto, bar recovery.<sup>20</sup> In accidents occurring at railroad crossings, the courts, agreeing that the man "must stop for the train, not the train stop for him,"<sup>21</sup> have held that a sixteen year old boy who while a guest in an automobile failed to warn the host of an approaching train while the car was still thirty feet from the track and the car could have been stopped in two feet was guilty of contributory negligence.<sup>22</sup> And, although there are cases implying that whether the passenger's failure to look constitutes contributory negligence is a jury question,<sup>23</sup> it has been said that if the rule is to be more than a "mere gesture," where the failure to maintain a lookout is clear, contributory negligence will be found as a matter of law.<sup>24</sup>

#### GUEST'S ACCEPTANCE OF THE CAR AND ITS DRIVER

Where the owner of an automobile who was about to make a pleasure trip, fully believing in the sufficiency of the car to make such trip with safety to the occupants, invited his father-in-law to ride with him and by reason of the giving away of a defective spring the father-in-law sustained an injury, no recovery was allowed the father-in-law

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the management of the car or to keep a constant lookout for imperfections in the road. *Brubaker v. Iowa County*, 174 Wis. 574, 183 N.W. 690 (1921).

<sup>20</sup> *Howe v. Corey*, supra; fact that passenger was asleep did not preclude recovery if there was no causal connection between the collision and such conduct. *Schmidt v. Leuthener*, 199 Wis. 567, 227 N.W. 17 (1929). Under the Comparative Negligence Law, supra, recovery of course would merely be cut down depending on the proportion which the guest's contributory negligence bore to the total negligence.

<sup>21</sup> *Baltimore & Ohio R. Co. v. Goodman*, 275 U.S. 66, 48 Sup. Ct. 24, 72 L.Ed. 167 (1927). "The condemned man goes to the gallows with certain trepidation, yet he goes to no more certain death than does he who places himself in front of an onrushing train. Since a train may be coming at any moment, the entrance upon a railroad track is or should be a matter of genuine solicitude." *Waitkus v. Chicago & N. W. R. Co.*, 204 Wis. 566, 236 N.W. 531 (1931).

<sup>22</sup> *Crane v. Weber*, (Wis., 1933) 247 N.W. 882. In this case the court remarks, "Had he not looked at all for the approach of the train, after seeing the wigwag in operation, we would have to say, under the rule of the *Waitkus* case, supra, that he was guilty of negligence as a matter of law, if the duty to look is obligatory or to be of any force or effect. It is useless to look if one is not to heed what he sees and give warning when he sees a train so near that a collision is imminent if the automobile is not stopped."

<sup>23</sup> *Tomberlin v. C. St. P. M. & O. R. Co.*, 208 Wis. 30, 242 N.W. 677, 243 N.W. 208 (1932); reaffirmed in *Paine v. C. M. St. P. Ry. Co.*, 208 Wis. 423, 243 N.W. 405 (1932). Ordinarily the verdict of jury will not be disturbed, where jury might have thought passenger should have seen danger had he been observing the road. *Glick v. Baer*, 186 Wis. 268, 201 N.W. 752 (1925).

<sup>24</sup> "It is futile to lay down a rule and then absolve performance of it in cases where juries plainly disregard it." *Crane v. Weber*, supra; *Rock v. Sarazen*, 209 Wis. 126, 244 N.W. 577 (1932).

for he took the car as he found it, attended by the same measure of security enjoyed by the owner and the other members of his family, and he was entitled to no more.<sup>25</sup> When a person enters a car, he accepts it in its existing condition except as to latent defects known to the driver.<sup>26</sup> Thus, passengers are bound by knowledge of some defect in the car such as poor brakes.<sup>27</sup> Upon the driver there is placed the duty of warning the guest as to any latent or concealed defect in the nature of a trap, known to him but unknown to the guest, and which the host believes dangerous and which he realizes involves an unreasonable risk to his guest. Thus in the case of *Waters v. Markham*,<sup>28</sup> where liability was sought to be predicated upon defective tires, the court said, "The issues raised on such claim were, whether the deceased (the driver) knew that his tires were in a defective condition and realized, or should have realized, that the tires in the condition they were in involved an unreasonable risk to the plaintiff; whether the defective condition of the tires was so concealed or hidden as not to be reasonably obvious or patent to the plaintiff; whether the defective condition of the tires and the risk involved therein were unknown to the plaintiff; and whether the deceased failed to warn the plaintiff as to the defective condition of the tires and the risk involved therein."<sup>29</sup>

A guest assumes the dangers incident to the skill, competence, and experience of the driver; this is true whether such degree of skill or amount of experience is known or unknown to the guest.<sup>30</sup> The fundamental basis for the exemption of a host from liability for injury sustained by a guest through lack of skill or experience is that the host

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<sup>25</sup> "In this case the damage resulted from a defective spring on the automobile. Negligent operation thereof is not claimed. We can see no difference between an invitation extended by a person to dine with him and an invitation extended to ride with him \* \* \* the guest accepts the premises of his host as he finds them, subject only to the limitation that the licensor must not set a trap or be guilty of active negligence which contributed to the injury. \* \* \* The guest has not a right to a greater security than that enjoyed by the host or other members of his family. The host simply places the premises which he has to offer at the disposal and enjoyment of his guest upon equal terms of security." *O'Shea v. Lavoy*, 175 Wis. 456, 185 N.W. 525 (1921). However, proceeding for some distance with a broken spring by a driver who knew that something was wrong with his car which materially interfered with its steering and control held to be negligence. *Sweet v. Underwriters' Casualty Co.*, 206 Wis. 447, 240 N.W. 199 (1932).

<sup>26</sup> *Poneitowicki v. Harres*, 200 Wis. 504, 228 N.W. 126 (1930).

<sup>27</sup> *Harding v. Jesse*, 189 Wis. 652, 207 N.W. 706 (1926).

<sup>28</sup> 204 Wis. 332, 235 N.W. 797 (1931).

<sup>29</sup> See also *Campbell v. Spaeth*, Wis. St. Jour., Vol. 15, No. 37, Oct. 14, 1933.

<sup>30</sup> *Harter v. Dickman*, 209 Wis. 289, 245 N.W. 157 (1932); reaffirmed in *Eisenhut v. Eisenhut*, (upon rehearing) Wis. St. Jour., Vol. 15, No. 37, Oct. 14, 1933.



has violated no duty toward such gratuitous guest.<sup>31</sup> Such exception from liability exists regardless of whether or not the driver was acting in an emergency;<sup>32</sup> in any situation a host cannot be held to exercise for the protection of his guest "a degree of skill which he is utterly unable to exercise for his own protection."<sup>33</sup>

Where the driver of an automobile was driving at her usual and customary rate of speed with which both passengers were perfectly familiar, such passengers, when they accepted her hospitality to ride with her to a picnic, accepted whatever risk attended the degree of proficiency which she had acquired as a driver and her usual and customary habits of driving with which they were familiar.<sup>34</sup> Thus, a guest, riding with an inexperienced driver, was denied recovery for injuries sustained when he was thrown out of the car where it appeared that a rear tire exploded and that the car skidded due to the driver's suddenly applying the brakes. He was held to have assumed as a matter of law the risks incident to the host's inexperience and lack of skill in handling a car in such a situation.<sup>35</sup>

A mother, riding with her daughter, in becoming a gratuitous passenger as she did with a driver who she knew had the very fault, failing or custom, whichever it may be, which caused the accident, i.e., of making turns too fast for safety, must be held to have knowingly

<sup>31</sup> "But while it is stated in several opinions of this court that the guest assumes the risk incident to the degree of skill possessed by the host, this is not the fundamental ground upon which the exception of a host from liability to a guest for injury sustained through lack of experience of the host is based. The fundamental basis of the exemption is that the host has not violated any duty owed to the guest." *Eisenhut v. Eisenhut*, supra.

<sup>32</sup> *Eisenhut v. Eisenhut*, supra.; nor can a guest recover for an honest exercise of judgment in what appears to the driver to be an emergency, for the rule in an emergency is "one who suddenly finds himself in a place of danger and is required to act without time to consider the best means that may be adopted to avoid the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence." *Siegl v. Watson*, 181 Wis. 619, 195 N.W. 867 (1923); followed in *Mellor v. Heggaton*, 205 Wis. 42, 236 N.W. 555 (1929).

<sup>33</sup> *Eisenhut v. Eisenhut*, supra; citing *Cleary v. Eckart*, 191 Wis. 114, 210 N.W. 267, 51 A.L.R. 576 (1926).

<sup>34</sup> *Olson v. Hermansen*, 196 Wis. 614, 220 N.W. 203, 61 A.L.R. 243 (1928).

<sup>35</sup> *Cleary v. Eckart*, supra; followed in recent case in which a car was upset by an inexperienced driver who was attempting to get wheels of automobile back on concrete where proof showed that driver did "the best he knew how." *Eisenhut v. Eisenhut*, (Wis., 1933) 248 N.W. 440. Rule also recognized in *Fontaine v. Fontaine*, 205 Wis. 570, 238 N.W. 410 (1931); *Ganzer v. Weed*, 209 Wis. 135, 244 N.W. 588 (1932); *Harter v. Dickman*, 209 Wis. 289, 245 N.W. 157 (1932).

assumed such risk.<sup>36</sup> Driving with a driver known to be very sleepy at the time the accident occurred indicates a willingness to assume the risks involved in such a situation.<sup>37</sup> Where a driver became nervous and lost control of the car when it began to sway, such nervousness due either to his lack of experience or to an exceedingly nervous system, it was held that "the only permissible inference" was that driver lost control because of his lack of skill and experience, risks assumed by the passengers in his car.<sup>38</sup>

#### NECESSITY OF PROTEST AGAINST RECKLESS CONDUCT

Although it is recognized that "much advice and many suggestions to the driver by one sitting in the rear seat are not conducive to the best management of the car,"<sup>39</sup> the passenger will be found to have acquiesced in the negligent operation of an automobile unless he protests against excessive speed, reckless driving, and dangerous practices indulged in by the driver.<sup>40</sup> Thus, where a group of individuals were going to a football game, and all of the parties knew of the time within which the trip to the football game was to be made, they were held to have assumed the risk of injury which resulted from making the trip in the manner in which it was made.<sup>41</sup>

<sup>36</sup> *Page v. Page*, 199 Wis. 641, 227 N.W. 233 (1929).

<sup>37</sup> *Krueger v. Krueger*, 197 Wis. 588, 222 N.W. 784 (1929).

<sup>38</sup> *Thomas v. Steppert*, 200 Wis. 388, 228 N.W. 513 (1930).

<sup>39</sup> *Brubaker v. Iowa County*, 174 Wis. 574, 183 N.W. 690 (1921).

<sup>40</sup> *Goehmann v. National Biscuit Co.*, 204 Wis. 427, 235 N.W. 792 (1931); but acquiescence in excessive speed for a period of twenty-five seconds is not contributory negligence, *Bryden v. Priem*, 190 Wis. 483, 209 N.W. 703 (1926). See also *Royer v. Saecker*, 204 Wis. 265, 234 N.W. 742 (1931).

<sup>41</sup> Neither driver nor occupant saw warning sign; when defendant reached top of hill he had to decide whether to run into driveway where there was a large rock or attempt turn; he attempted turn. "Plaintiff as well as defendant realized the risk. It is not claimed that any one from time peril was apprehended up to time injuries were sustained could have avoided the result. The accident was the result of maintaining too high a speed. If the turn had been successfully negotiated, no one would have thought of complaining of the conduct of the defendant or of charging him with any lack of care or skill. Because of an unpropitious combination of circumstances injury did result and it is sought to fasten the responsibility therefor on the host who gratuitously furnished his car for the benefit of the entire party. Despite the finding of the jury to the contrary, it appears as conclusively as it is possible for it to appear that the plaintiff assumed the risk of injury which resulted from making the trip in the manner in which it was made, under the circumstances of this case. Due to the fact that a hill intervened, the turn was a blind one. The defendant knew no more about the road than did the plaintiff. \* \* \* Within the rule of *Olson v. Hermansen*, 196 Wis. 614, 220 N.W. 203, and cases there cited, it must be held in this case that the plaintiff assumed the risk as a matter of law and a verdict for the defendant should have been directed by the court." *Brockhaus v. Newman*, 201 Wis. 57, 228 N.W. 477 (1930).

In a case in which the passengers of an automobile offered no protests or uttered no remonstrances against violation of the speed limit until the car had arrived at a point where collision was inevitable, the passengers were held to have assumed the risks involved in such operation of the car. The court said, "We fully appreciate the delicate situation of a gratuitous guest when it comes to protesting or remonstrating to the host with respect to illegal speed or with respect to any other negligence in the operation of a car. However, the law in this state is now well established \* \* \* that a gratuitous guest cannot idly sit by, observe clear violations of law, in fact acquiesce in them, and then, in the event of an accident, hold his host liable for damages. The privilege of a gratuitous ride is accompanied by a corresponding obligation, and such obligation must be met if liability should ensue."<sup>42</sup> Thus, "joy riders" driving an automobile at a high speed, "merely for the purpose of enjoying the exhilarating and pleasurable sensations incident to the swirl and dash of rapid transit," assume the risks of danger attendant upon such reckless driving.<sup>43</sup>

It follows from such holdings that one who rides with an intoxicated driver assumes the risk of whatever injuries may be caused thereby;<sup>44</sup> also, willingness to proceed with a dozing and wearied driver indicates some assumption of risks involved.<sup>45</sup> Under adverse driving

<sup>42</sup> *Harding v. Jesse*, 189 Wis. 652, 207 N.W. 706 (1926).

<sup>43</sup> *Winston's Administrator v. City of Henderson*, 179 Ky. 220, 200 S.W. 330 (1918). "Here was a car admittedly plunging through the night on straight stretches at a rate of forty-seven to sixty miles per hour, the curtains down, the disturbed atmosphere assuredly rushing like an incipient tornado by the speeders' ears. \* \* \* With a lighted speedometer directly facing him, acquainted with cars both as passenger and driver, with the car lights covering the road fifty or seventy-five feet ahead, with the swish of gravel and roar of the air, can it be said that any human being in possession of his five senses may be heard to say that at this abandoned rate of speed he possessed his soul in sweet oblivion and 'didn't notice anything out of the way, the way it was riding?' For the man in the street, the reasonably prudent citizen whose legislative representatives have unequivocally banned such wanton driving on the public highways, plaintiff's plea will fall on deaf ears. If plaintiff did not know, he should have known, and in law is fixed with knowledge that was being flashed to him on every side." *Dale v. Jaeger*, 44 Ida. 576, 258 Pac. 1081 (1927). Cited in William W. Hamilton "The Rights and Liabilities of Gratuitous Automobile Passengers," 10 Chicago-Kent Law Rev. 32.

<sup>44</sup> *Biersach v. Wechselberg*, 206 Wis. 113, 238 N.W. 905 (1931). It should be here mentioned that by proceeding on a journey the occupant does not assume risks of injury caused by negligence of users of the highway other than the driver unless the acts of such driver in which the guest acquiesced operated as a cause of the collision. *Cameron v. Union Automobile Insurance Co.*, (Wis. 1933). 246 N.W. 420; explained in *Wiese v. Polzer*, (Wis., 1933) 248 N.W. 113.

<sup>45</sup> *Krueger v. Krueger*, 197 Wis. 588, 222 N.W. 784 (1929).

conditions it is probable that a willingness to proceed at all would entail an assumption of whatever risks are attributable to such adverse driving conditions. In a recent case a woman riding on the front seat of an automobile driven by her husband sought recovery for injuries incurred when her husband's automobile collided with another machine. Testimony showed that the weather conditions were adverse, there being a very heavy fog which rendered headlights useless. Upon appeal a lower court judgment for the plaintiff was reversed with directions to dismiss the complaint. The court found that there was complete assumption of risk. "The plaintiff was riding in the front seat with her husband. She was fully aware of the foggy condition, commented upon it, and clearly must have known of the dangers and hazards incident to traveling under such conditions. At times the fog was so bad that the lights of an approaching car could be seen for a distance of only thirty feet; yet through this fog she and her husband continued to travel without protest on her part and without coercion by her husband."

Upon this set of facts the court felt impelled to remark. "May it be said with reason and common sense that a person may ride in a car for many miles under such conditions without fully assuming the risk of injury incident to such a trip? We think not. The plaintiff knew that the fog was so bad that it was possible to see only a few feet ahead. She deemed it necessary to watch the right edge of the concrete in order to assist her husband in keeping the car on his side of the road and prevent its going into the ditch. She knew how difficult it was for her to see objects for any distance ahead, and, consequently, knew how difficult it was for her husband to see. Though we have not heretofore had a case before us in which the facts were substantially similar, we feel impelled to hold under the well-established rules applicable to assumption of risk by an occupant of an automobile, that the plaintiff assumed the risk, and, in justice, should not be permitted to recover damages from her husband."<sup>46</sup> The *Knipfer* case is important in that it lists, in fairly objective form, the elements necessary to assumption of risk; these are (1) hazard or danger inconsistent with the safety of the guest; (2) knowledge and appreciation of the hazard by the guest; (3) acquiescence or willingness to proceed in the face of the danger.

<sup>46</sup> *Knipfer v. Shaw*, (Wis., 1933) 246 N.W. 328. See also *Howe v. Corey*, 172 Wis. 537, 179 N.W. 791 (1920); in this case defendant drove automobile with "frosted" windshield due to zero weather and with automobile lights that were in poor condition; car was operated at a reckless rate of speed and collided with train; plaintiff testified that he mentioned to driver that speed at which they were proceeding was pretty fast, but admitted he was keeping no lookout. Court held plaintiff acquiesced in the operation of the car and assumed the hazards and dangers incident thereto.

However, the "assumption of risk" standard laid down in the *Knipper* case does not bar such defense where the negligence of the driver is of momentary character, even though there is no opportunity for passenger acquiescence or passenger protest against such momentary negligence. Thus, in a very recent case, where the driver of the car involved, driving at a rapid rate of speed and while passing another vehicle on the right hand side of such vehicle, suddenly swerved to avoid hitting a truck which loomed up in front of him, the Wisconsin Supreme Court held that such swerving even if it were considered to be negligence "cannot be separated from his negligence in getting into the situation and as to this the plaintiff assumed the risk."<sup>47</sup> The Court remarks that the reasonable rule compels the guest to accept the host with all his infirmities of skill and judgment.<sup>48</sup>

### "BACK SEAT DRIVING"

The foregoing commentary on the necessity of passenger protest against excessive speed and reckless driving should not be interpreted as indicating that the Wisconsin Supreme Court has judicially sanctioned "back seat driving." As a matter of fact such persistent suggestions as to the immediate operation of the car have been held to be "an abominable practice."<sup>49</sup> It would seem that circumstances might

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<sup>47</sup> *Young v. Nunn-Bush Co., et al.*, (Wis., 1933) 249 N.W. 278. The Court reaffirmed the rule that "\* \* \* the guest must take the host with his defects of skill and judgment and known habits and eccentricities and in addition the guest is considered to acquiesce in any course of driving that has persisted long enough to give him an opportunity to protest and thus indicate his dissent or disapproval of the manner of driving," and also held, "If the host proceeds at a negligent rate of speed which the guest assumes and by reason of this speed finds himself in a situation requiring instant decision and giving him opportunity for further negligence with respect to control it is impossible to isolate the subsequent negligence from the prior negligence and to hold in spite of the fact that the guest has acquiesced in the former that the momentary character of the latter makes acquiescence impossible."

<sup>48</sup> See *Harter v. Dickman*, 209 Wis. 289, 245 N.W. 157 (1932), where the court remarks, "If in a given case it appears that observations have been made and that a host has exercised his judgment as to the operation of his automobile but has not in fact exercised the best judgment, as a result of which injury results to a guest, the latter in such a situation, should not be permitted to recover, because the host has exercised such skill as he possesses and has exercised such judgment as he is capable of exercising."

<sup>49</sup> "We do not consider that the law casts upon the occupants of a car any duty with reference to the manner in which the car is momentarily managed by the driver. Not only does it not cast any duty upon them in such respect, but it should not recognize any prerogative on their part. 'Driving from the back seat' should not be encouraged when it comes to the details of car management in emergencies. The practice is not indulged in by considerate persons,

arise which would make it difficult to determine whether a suggestion as to the management of an automobile constituted "back seat driving" or a necessary protest against reckless operation of the car. The court's viewpoint seems to be that interference in the momentary management of the vehicle is objectionable, but complaints on less temporary matters, such as general rate of speed and general driving habits, and hazardous driving conditions are to be encouraged.<sup>50</sup>

And while it has been decided that a passenger cannot remain as indifferent to the operation of an automobile as if he had been but a disinterested bystander,<sup>51</sup> the courts seem to refuse to define exactly what degree of protestation will relieve such passenger from assumption of risk.<sup>52</sup> Even a protest may be insufficient, if it is not heeded;<sup>53</sup> negligence may be predicated upon unreasonably remaining in the machine, or not insisting upon leaving the machine, where

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and, if it were, the harm would exceed the good. The momentary management of the car should be left to the driver. He understands his car and appreciates the control he has over it, and what he can do with it, better than does the passenger. Continual suggestions are but confusing and irritating and we think it better that it be definitely understood that neither duty devolves upon, nor prerogatives belong to the occupants of a car to participate in its immediate management and control. They have a duty to warn, and a duty to protest against excessive speed and reckless conduct. These, however, are all apart from the immediate management of the car and especially in emergencies." *Goehmann v. National Biscuit Co.*, supra; see also *Brubaker v. Iowa County*, supra.

<sup>50</sup> As a matter of law there is not contributory negligence where passenger did not know exactly the form of turn driver intended to make and where the turn onto the crossing in the manner in which it was effected was rather sudden and plaintiff had no control over the car. *Vogel v. Otto*, 182 Wis. 1, 195 N.W. 859 (1923). Nor where driver suddenly turned car into ditch. *Krantz v. Krantz*, (Wis., 1933) 248 N.W. 156.

<sup>51</sup> *Wobosel v. Lee*, 209 Wis. 51, 243 N.W. 425 (1932).

<sup>52</sup> "No case has been found, however, which attempts to define the amount of protestation necessary to relieve the guest of contributory negligence as a matter of law. When it is considered that the guest has no control over the automobile and that it is not within his or her power to coerce the driver, it is apparent that all the guest may do is to indicate to the host his or her displeasure with reference to the manner in which the car is being driven. Under such circumstances the considerate host will respect the feelings of his guest and modify his rate of speed or other reckless conduct, to conform to the pleasure of his guest. Should the host persist in his reckless driving, the guest may ask to be let out of the car, but that he should do so under all circumstances has never been held his duty as a matter of law, so far as we are advised. Here the plaintiff did protest not once but several times. She did not ask to be let out of the car, and it was for the jury to say whether her failure in this respect constituted a want of ordinary care on her part." *Krause v. Hall*, 195 Wis. 565, 217 N.W. 290 (1928).

<sup>53</sup> *Sheehan v. Coffey*, 205 App. Div. 388, 200 N.Y. S. 55 (1923).

passenger is aware of the excessive speed and reckless driving.<sup>54</sup> To a considerable extent each case rests upon its own peculiar circumstances; and to some extent generalizations may be misleading; therefore, it is probable that the most one can conclude is that the passenger must conduct himself as a reasonably prudent person would under the circumstances.

#### ADVISABILITY OF ADOPTING A "RECKLESS OPERATION" STATUTE IN WISCONSIN

Within the last few years the legislatures of several of the states where the prevailing rule of ordinary care applies have, by legislative enactment, considerably limited the liability of the driver of the automobile.<sup>55</sup> Such statutory changes are undoubtedly actuated by a realization of the harshness of a rule that requires the driver to exercise more care to protect his gratuitous guest than to protect his own life,<sup>56</sup> and by an understanding of the injustice involved in permitting a guest to accept the hospitality of his host in enjoying the automobile and then

<sup>54</sup> *Krause v. Southern Mich. R. Co.*, 215 Mich. 139, 183 N.W. 768 (1921).

<sup>55</sup> Calif., Gen. Laws, sec. 141.75; Colo., Sess. Laws (1931) c. 118; Conn., Gen. Stat. (Rev. 1930) sec. 1628; Del., Laws (1929) c. 270; Idaho, Sess. Laws (1931); c. 135; Ill., Laws (1931) p. 779; Indiana, Laws (1929) c. 201; Iowa, Code (1931) No. 5026-bl; Kansas, Laws (1931) c. 81; Maryland, Laws (1931) c. 391 (vetoed); Michigan, Comp. Laws (1929) sec. 4648; Montana, Laws (1931) c. 195; Nebraska, Laws (1931) c. 105; North Dakota, Laws (1931) c. 184; Oregon, Laws (1929) c. 401; Texas, Gen. Laws (1931) c. 225; Vermont, Public Acts (1929) No. 78; Wyoming, Rev. Statutes (1931) sec. 72-701. The pertinent terms in these statutes describing the conduct for which the driver becomes liable to his gratuitous guest are as follows: Calif., "intoxication, willful misconduct, or gross negligence;" Colorado, "intentional \* \* \* intoxication \* \* \* or \* \* \* negligence consisting of a willful and wanton disregard of the rights of others;" Conn., "intentional \* \* \* or caused by his heedlessness or his reckless disregard of the rights of others;" Idaho, "intent \* \* \* gross negligence or his reckless disregard of the rights of others;" Ill., "willful or wanton misconduct;" Indiana, "intent \* \* \* or caused by his reckless disregard of the rights of others;" Iowa, intoxication or "reckless operation;" Kansas, "gross and wanton negligence;" Maryland, "gross negligence;" Mich., "gross negligence or his wilful or wanton misconduct;" Montana, "grossly negligent and reckless operation;" North Dakota, "intoxication, willful misconduct or gross negligence;" Oregon, "intentional or caused by his gross negligence or intoxication or his reckless disregard of the rights of others;" Texas, "intent \* \* \* or caused by his heedlessness or reckless disregard for the rights of others;" Vermont, gross or willful negligence; Wyoming, "gross negligence or willful and wanton misconduct." (This summary of so-called "guest statutes" taken from Note, "The Liability of the Driver of an Automobile to his Gratuitous Guest," 18 Iowa Law Rev. 78 [1932].)

<sup>56</sup> Minor Brounagh, "Liability of Owner for Injury to Guest of Servant or Borrower of Car," Law Notes, April, 1928, p. 7.

upon being injured while riding with him, to retaliate by suing his host for damages.<sup>57</sup> Legislatures have probably also been cognizant of the fact that a great deal of the litigation between guest and host is prompted solely by the fact that the latter has carried liability insurance, and the insurance company is the real defendant;<sup>58</sup> such actions are likely to be collusive in character, often being mere meritless attempts to recover damages from a member of the immediate family of the injured person.

It is apparent that by the adoption of such "gross negligence" or "guest" statutes the legislatures of these various states are as a practical proposition adopting the minority rule as to the liability of automobile driver to automobile passenger,<sup>59</sup> and hold the driver liable only for gross negligence.<sup>60</sup> Such statutes, at least if they do not entirely abolish all liability on the part of a driver, are clearly constitutional; it has been held that such statutes do not violate the "due process of law" or "equal protection of the law" clauses of state or federal constitutions.<sup>61</sup> Such statutes, properly worded,<sup>62</sup> hold the driver of a

<sup>57</sup> "The reason for the minority rule is that when one asks or accepts the hospitality of another he takes upon himself the risk of such injury as may result from that casual or ordinary negligence which even careful drivers sometimes display." Frank Mechem & Lowl P. Mickelwait, "Gross Negligence," 5 Wash. Law Rev., 91,104 (1930).

<sup>58</sup> "Counsel for defendant may be right in his attitude that the numerous cases now arising wherein a guest in an automobile, frequently closely related to the driver, sues him for damages because of his alleged negligence but more because of his insurance call for some new law. It may be that as a practical matter the most important fact in the case is that the defendant is insured." *Truso v. Ehnert*, 177 Minn. 249, 225 N.W. 98 (1929). Similar situation discussed in *Fontaine v. Fontaine*, 205 Wis. 570, 238 N.W. 410 (1931). "The record shows that this is an action by the wife against her husband. It also shows that the husband is not averse to recovery by the wife. The testimony given by both husband and wife upon the trial does not conform to written statements made by them to the insurance company prior to the trial, etc."

<sup>59</sup> The minority rule is that the owner of an automobile is liable to his guest for gross negligence only. See *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N.E. 168 (1917); *Cook v. Cole*, 273 Mass. 537, 174 N.E. 271 (1931); *Carpenter v. Thomas*, 164 Wash. 583, 3 P. (2d) 1001 (1931); *McDonald v. Balletti*, 164 Wash. 595, 4 P. (2d) 506 (1931); *Engle v. Finch*, 37 Ga. App. 389, 140 S.E. 632 (1927).

<sup>60</sup> "It is apparent from a review of the authorities that by the adoption of the guest statutes, the several states in so doing have in fact adopted the minority rule of no recovery without gross negligence." Hon. Sumner Kenner, "Statutes Regulating Liability of Owner or Operator of an Automobile for Injury to a Guest," 19 Amer. Bar Ass'n. Jour. 231 (1933).

<sup>61</sup> *Naudzuis v. Lahr*, 253 Mich. 216, 234 N.W. 581 (1931); *Silver v. Silver*, 108 Conn. 371, 143 Atl. 240 (1928), aff'd. in 280 U.S. 117, 50 Sup. Ct. 57, 74 L. Ed. 221 (1929).

<sup>62</sup> "It is submitted that the view adopted by the Iowa, Michigan, and Connecticut



motor vehicle liable only for reckless operation, meaning by recklessness something more than mere negligence, implying "no care, coupled with disregard for the consequences."<sup>63</sup>

### CONCLUSION

It is evident from the foregoing that the development of the law in Wisconsin covering the liability of automobile drivers to gratuitous passengers has had an interesting history. For fifty years prior to 1921 the guest could not recover against the host because of the doctrine of imputed negligence. The abandonment of that rule of law immediately gave rise to a mass of litigation. Wife sued husband. Father sued son. Sweethearts upon the threshold of marriage became adverse litigants in the courts.

From a moral and ethical point of view this mass of litigation was not inspired by any desire to find fault with the driver, nor by a desire to add insult to injury by demanding money damages from the host; but basically this litigation was a means to the end that the insurer of the host should pay for the host's negligence. We feel that this underlying attitude was controlling in the rapid development of the host-guest law since 1921 which placed constantly increasing limitations on the right of the guest to recover from his host until today we could again cite as the prevailing rule that portion of the decision of Mr. Chief Justice Ryan in *Prideau v. City of Mineral Point* to the effect that "One voluntarily in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own, and assumes the risk of the skill and care of the person guiding it."

As the law stands today, each case rests and must be decided on its own facts. While the duty of the guest for his own safety and the obligation of the host has from time to time been defined, there is no certainty in the law. The court itself is helpless in this situation. As the judicial branch of the government its duty is to administer justice on the facts of each case by the application of rules of law.

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courts is preferable. That view, briefly stated, removes all liability except for misconduct manifesting willfulness or evincing a reckless disregard for the rights of others \* \* \* to include negligence, though of a high degree, makes it extremely doubtful whether the statute would accomplish any change at all particularly in states where degrees of negligence are not recognized. \* \* \* It would seem better to design the conduct for which the statute seeks to impose liability as "recklessness," reckless operation, or reckless disregard for the rights of others." Note, "The Liability of the Driver of an Automobile to His Gratuitous Guest," *supra*.

<sup>63</sup> *Siesseger v. Puth*, 211 Iowa 775, 239 N.W. 46 (1931).

Much can be said however in favor of legislative action already taken in at least fifteen states which has defined the duty of the host to his guest in line with the moral, ethical, and social understanding of the host-guest relationship. These statutes generally limit the host's liability to cases of gross negligence. Consequently they put at rest a great deal of litigation. They are real measures of economy in the cost of maintaining the judiciary. They are also a wholesome social influence in maintaining and encouraging a generous and altruistic relationship between those blessed with an automobile and those who cannot afford to own one. The subject recommends itself to legislative consideration.